

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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Yun CHEN,

A72 183 172

Plaintiff,

Civil No. 1:07-cv-03120-DC

-against-

**COMPLAINT**

Michael CHERTOFF,

Secretary, Department of Homeland Security,

Mary Ann Gantner,

District Director, U.S. Citizenship and

Immigration Services, New York City District

Alberto GONZALES,

Attorney General of the United States

United States of Citizenship and

Immigration Services,

Defendants.

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Plaintiff, Yun CHEN, by and through counsel, alleges the following:

1. This is an action for declaratory and injunctive relief and in the nature of a mandamus to compel agency action that has been unlawfully withheld.

## **JURISDICTION**

2. This action arises under the Immigration and Nationality Act of 1952, as amended (“INA”), 8 U.S.C. §§1101 *et seq.*, the Administrative Procedure Act (“APA”), 5 U.S.C. §§551 *et seq.*, and the mandamus statute, 28 U.S.C. §1361. This court has subject matter pursuant to 28 U.S.C. §§1331, 1337 and 1361; the Court may grant relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§2201 *et seq.*, the INA, the APA, and 28 U.S.C. § 1361.

## **PARTIES**

3. Plaintiff, Yun CHEN (hereinafter, Ms. CHEN), is a native and citizen of the People’s Republic of China born on October 21, 1971.

4. Ms. CHEN is currently residing at 100 Allen Street, Apartment 5-B, New York, New York, 10002, which is within the jurisdiction of this Court.

5. Defendant United States Citizenship and Immigration Services (“BCIS”) is an agency organized and existing under the laws of the United States of America. The BCIS has responsibility for adjudicating applications under the Act, and maintains offices within the Southern District of New York.

6. Defendant Michael CHERTOFF, is the duly appointed, qualified, and confirmed Secretary of the Department of Homeland Security, and as such is the official charged with the supervision, oversight, and direction of the BCIS.

7. Defendant, Mary Ann GANTNER, is the district director for the New York District of the BCIS. The New York District office has jurisdiction over the five boroughs of New York City and the nine counties within the State of New York, and has the responsibility of adjudicating immigration applications within these confines.

8. Defendant Alberto GONZALES is the duly appointed, qualified, and confirmed Attorney General of the United States, and as such is the official charged with the enforcement of the laws of the United States and the official charged with the enforcement of the laws of the nation.

### **VENUE**

9. Venue is proper in that Petitioner resides at 100 Allen Street, Apartment 5-B, New York, New York, 10002, which is within this District. Petitioner's application for naturalization is pending before USCIS' New York District Office at 26 Federal Plaza, New York, NY, which is also within this District.

### **FACTS**

10. On October 2, 1996, Ms. CHEN was granted asylum in the United States.

11. On March 10, 1997, Ms. CHEN was issued an I-94 card showing “asylum status granted pursuant to section 208 INA valid indefinitely.”

12. Ms. CHEN filed an application to adjust her status to that of a lawful permanent resident prior to May 2, 1998.

13. On May 2, 1998, Ms. CHEN received a notice that she was scheduled for an interview with the then-Immigration and Naturalization Service for March 4, 1999.

14. On March 4, 1999, Ms. CHEN was interviewed by the then-Immigration and Naturalization Service at the New York District Office, 26 Federal Plaza, New York, NY for adjustment of status.

15. On August 4, 2000, Ms. CHEN received a letter from Edward McElroy, then District Director for the New York District Office, notifying Ms. CHEN that her application for permanent resident status had been retained for the allocation of an Immigrant Visa number. The letter informed Ms. CHEN that the wait would be approximately one to two years.

16. Upon information or belief, on or about December 5, 2000, Ms. CHEN had her fingerprints taken as part of the standard procedure for processing applications for adjustment of status to that of a lawful permanent resident.

17. On February 14, 2003, Ms. CHEN inquired, by letter, to the Supervisor of the 245 Section of the then-INS, about the status of her adjustment application and noting Ms. CHEN's change of address. No response was received.

18. On December 12, 2003 a Status Inquiry Form was hand delivered to the 245 Section of the New York District Office inquiring about the status of Ms. CHEN's application. No response was received.

19. On July 29, 2004, Ms. CHEN inquired again, by letter, to the 245 Section of the New York District Office, about the status of her adjustment application.

20. On September 9, 2004, Ms. CHEN made a personal inquiry with the New York District Office using INFOPASS (a procedure for obtaining status information regarding one's case).

21. Upon information and belief, an officer at the 245 Section of the New York District Office informed Ms. CHEN at the INFOPASS inquiry that her file was no longer at the New York District Office and that

he could not locate the file or provide any additional information about the status of the case.

22. On December 2, 2004, Ms. CHEN, by letter, made an additional inquiry into the status of her case. No response was received.

23. On September 15, 2005, Ms. CHEN, by letter, made an additional inquiry into the status of her case. No response was received.

24. On November 17, 2005, Ms. CHEN, by letter, made an additional inquiry into the status of her case. No response was received.

25. In order to qualify for adjustment of status to that of a lawful permanent resident, as a person having been previously granted refugee status, an alien must meet the following criteria:

- (1) applies for such adjustment,
- (2) has been physically present in the United States for at least one year after being granted asylum,
- (3) continues to be a refugee within the meaning of section 1101 (a)(42)(A) of this title or a spouse or child of such a refugee,
- (4) is not firmly resettled in any foreign country, and
- (5) is admissible (except as otherwise provided under subsection (c) of this section) as an immigrant under this chapter at the time of examination for adjustment of such alien.

8 U.S.C. § 1159 (b).

Ms. CHEN meets this criteria.

### **COUNT ONE**

26. The allegations set forth in paragraphs 1 through 25 above are repeated and re-alleged as though fully set forth herein.

27. Under the APA, 5 U.S.C. § 555(a), agencies are required to proceed with reasonable dispatch to conclude matters presented to them. Under the APA, 5 U.S.C. §706(a), this Court has the power to compel agency action which has been unlawfully or unreasonably withheld or delayed.

28. The continuing failure of the USCIS to adjudicate Ms. CHEN's application for Adjustment of Status (form I-485), filed over violates the APA requirement that agencies proceed with reasonable dispatch to adjudicate the matters presented to them.

### **COUNT TWO**

29. The allegations set forth in paragraphs 1 through 28 above are repeated and re-alleged as though fully set forth herein.

30. The actions of USCIS, in failing to adjudicate Ms. CHEN's adjustment application deprives Ms. CHEN of a protected interest contrary to the Due Process clause of the Fifth Amendment of the U.S. Constitution. *See INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1219 (1987) ("The distinction between the mandatory and discretionary parts of the statute has

practical significance. What the Attorney General and his delegates must exercise is discretion.”) (citations omitted); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954). (“failure to exercise discretion is a reversible error.”); *Asimakopoulos v. INS*, 445 F.2d 1362, 1365 (9th Cir. 1992) (“The Board’s failure to exercise discretion is reversible error.”); *Fesseha v. INS*, 1999 U.S. App. LEXIS 20852, \*4 (10th Cir. 1999) (“When the regulations grant the attorney general discretion, the attorney general must to exercise its discretion.”); *Kazlauskas v. INS*, 46 F.3d 902, 905 (9th Cir. 1995) (“If an applicant can show eligibility for asylum, then the INS must exercise its discretion to determine if the applicant is entitled to asylum.”); *Doe v. United States*, 54 Fed. Cl. 404, 405 (2002) (when congress divest an agency discretion, the agency “must exercise its discretion” when deciding matters before it.).

### **COUNT THREE**

31. The allegations set forth in paragraphs 1 through 30 above are repeated and re-alleged as though fully set forth herein.

32. The failure of USCIS to adjudicate Ms. CHEN’s application to adjust her status constitutes irreparable harm.



**WHEREFORE**, Ms. CHEN prays this Honorable Court and demands judgment against defendants as follows:

- a. Declare the failure of the United States of Citizenship and Immigration Services to adjudicate Ms. CHEN's application to adjust her status unlawful;
- b. Order defendant to adjudicate the applications forthwith;
- c. Grant Ms. CHEN's costs and attorney's fees associated with this action; and
- d. Grant any and all other relief this Court deems just and proper.

Dated: New York, New York  
April 13, 2007

Respectfully submitted,



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Joshua Bardavid, Esq.  
Counsel for Petitioner

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New York, New York 10013  
Phone: (212) 219-3244  
Fax: (212) 219-3235  
Email: Josh@Bardavidlaw.com

### **ATTORNEY VERIFICATION**

I, Joshua Bardavid, authorized representative of Plaintiff, affirm under penalty of perjury that:

The statement of facts contained in the Complaint are true my knowledge, except as to those matters that are stated in it on my information and belief, and as to those matters, I believe them to be true.

Dated: New York, New York  
April 13, 2007

Respectfully submitted,



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Joshua Bardavid, Esq.  
Counsel for Petitioner

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**AFFIRMATION OF SERVICE**

Joshua E. Bardavid, being an attorney duly admitted to the practice of law in the States of New York and in the courts of the United States does hereby affirm under penalties of perjury and pursuant to New York CPLR 2106 that the following is true:

On April 13, 2007, I placed a true copy of the attached Petition for a writ of Mandamus in a secure envelope and mailed the same via U.S. Postal Service, postage pre-paid, to:

U.S. Attorney's Office  
for the Southern District  
86 Chambers Street, 3<sup>rd</sup> Floor  
New York, NY 10007

Alberto Gonzales, Attorney General of the United States  
United States Department of Justice  
10th St. & Constitution Avenue, NW  
Washington, D.C. 20530

Mary Ann Gantner, District Director  
26 Federal Plaza 8th Floor, Room 800  
New York City, NY 10278

Michael Chertoff, Secretary  
Department of Homeland Security  
Nebraska Avenue Center, NW  
Washington, D.C. 20508

Dated: New York, New York  
April 13, 2007



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